CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
MINUTES OF THE MEETING, Public Session

Friday, February 4, 2000

Call to order: Chairman Karen Getman called the monthly meeting of the Fair Political Practices Commission (FPPC) to order at 9:08 a.m. at 428 J Street, Eighth Floor, Sacramento, California. In addition to Chairman Getman, Commissioners William Deaver, Kathleen Makel and Gordana Swanson were present.

Item #1. Approval of the Minutes of the January 6 and 7, 2000, Commission Meetings.

The minutes of the January 6 and 7, 2000, Commission meeting were distributed to the Commission and made available to the public. There being no objection, the minutes were approved.

Item #2. Public Comment.

Cynthia Bryant, representing Senator Ross Johnson, explained that Senator Johnson initiated Proposition 73, in part to place tighter restrictions on taxpayer funded mass mailings. The Senator believes that the regulation adopted by the Commission ten years ago contains many loopholes.

As an example, $24,000.00 in taxpayer monies was used last month, by a sitting assembly member to purchase postage for a mailer timed to reach the district the weekend before the special election in which the assembly member's name was to appear on the ballot. The Senator asked that the Commission revisit the mass mailing regulation as an urgent matter.

Wilda White, a resident of Oakland, California, expressed her concern that notice of FPPC workshops was inadequate. She noted that planning departments keep lists of property owners who might be affected by decisions, and urged the Commission to try to reach the communities in more creative ways.

Chairman Getman pointed out that the Commission is very concerned about notification and asked for help from Ms. White and any neighborhood organizations to get the word out about meetings and workshops.

Item #3. Late Fines for Electronic Filing: The *Wood* Opinion, No. O-99-315.

Senior Commission Counsel Hyla Wagner presented an opinion request from Bill Wood, Chief Counsel from the Secretary of State's office (SOS), asking what late filing fines, if any, applied to electronic filing.

Ms. Wagner stated that the Political Reform Act (PRA) section 91013 sets out the fines for late filing of a statement or report and noted the responsibilities and duties of the filing officers. She pointed out that the fines are the first tool used for achieving compliance, and that FPPC enforcement actions would be the second tool.

Ms. Wagner noted the amounts and methods of determining fines, as well as the method of processing the fines by the Secretary of State's Office (SOS) before electronic filing began. She explained that fines were automatically assessed when the original was filed late, and added that a second paper copy was also required to be filed, but that the SOS did not impose fines if the copy was not filed unless specific notice of the failure to file was sent to the requestor.

Ms. Wagner explained that SB 49 and its 1999 amendments require online filing but did not discuss whether the online filing would be considered an original or a copy.

Ms. Wagner outlined two options for the Commission to consider. The first option would consider both the electronic and paper versions as originals, as supported by the plain meaning of section 84605(j). Ms. Wagner noted that while the paper and the electronic versions are the same filing, there are slight differences and therefore both could be considered originals. Under this option, the SOS could impose fines for late filings of both the paper and electronic versions from the due date.

The second option, Ms. Wagner explained, would be to consider the paper version to be the original until the determination under section 84606 that the electronic version is working effectively, and then the electronic version would become the original. The electronic version would be treated as a copy until then. She added that this option seemed to match the legislative intent and the structure of the online filing provisions, and noted that it equates the term "official version" with the term "original." This option, she noted, is a slightly weaker position in terms of the late fines, because written notice would have to be given to the filer before fines could be imposed.

William Wood, Chief Counsel to the Secretary of State, stated that it is most legally consistent to construe the electronic and paper filing as originals for all purposes. He noted that it is important because the electronic filing will become the only filing in California at the end of the transitional period and therefore it will be important for filers to treat the electronic filing in the same fashion as the paper filing during the transition period.

Chairman Getman noted that since the electronic filing will be considered the original at

the end of the transition period, it would be appropriate to consider it an original during the transition period. However, she pointed out, considering it an original during the transition period might not give the Secretary of State's Office enough flexibility because the fines are automatic and must be imposed.

Mr. Wood agreed that it was a concern to his office, but that the fine provisions give the SOS flexibility in terms of when the fines can be imposed, and that flexibility would be utilized if they were made aware of difficulties caused by the new electronic system.

Commissioner Swanson noted that candidates at the local level have a hard time just making a campaign work, and that filing twice could be very difficult for them.

Mr. Wood responded that the SOS was concerned about that, and that their office was planning to work with the candidates to help them with these obligations. He added that the electronic filing compliance rate for the filing period that recently ended was at sixty-five percent, which was a fairly good compliance rate for a new system.

Caren Daniels-Meade, head of the Political Reform Division at the SOS, pointed out that electronic filing does not yet apply to local candidates, and that there is a threshold of $100,000 of activity for filing. She noted that the SOS has a toll-free number for candidates to call for help with electronic filing, and that a modest public relations contract has been issued to provide ongoing outreach on electronic filing.

Chairman Getman added that staff from the SOS was working literally around the clock during the filing period to help candidates with electronic filing. She noted that the flexibility provided to the SOS under subsection (a) was contingent upon the candidate eventually filing.

Lance Olson, from the law firm of Olson Hagel, pointed out that the SOS will have the paper copies to identify who has not yet filed electronically, and that the procedure for notifying those candidates be flexible, since fines must be assessed once the written notifications had been made and waiting periods had passed. He suggested that additional notification and extra time be allowed.

Chairman Getman noted that the FPPC has phoned people to notify them of the new filing requirements, and noted that a Public Education Unit at the FPPC, if funded, would be able to help notify candidates about their filing requirements.

Commissioner Scott joined the meeting at 9:40 a.m.

Caren Daniels-Meade reported that the SOS had sent an advance letter to those candidates who they thought might need to file electronically, and that they will be unofficially contacting

the non-filers. She added that they will be adding a component to the good cause waiver policy for electronic filing so that they will have another legitimate reason for waiving a fine.

Lawrence J. Sokol, with the Senate Committee on Elections and Reapportionment, noted that in section 84605(j), the use of the word "original" was not used as it was conceived in the rest of the PRA. The intent was to ensure that the SOS would take the filing that came to them and keep it separate from whatever filing was posted.

Chairman Getman explained that there is only one electronic filing, and the one that gets filed is the one that gets posted.

Mr. Sokol explained that the intent was to ensure that the electronic filings were done, but also to allow as much flexibility as possible.

Chairman Getman noted that it is important for the filing officer to be able to investigate and impose low level fines before involving an enforcement action. She expressed her concern that if the electronic filing is not considered an original, it would immediately become an enforcement issue, and would require a legislative fix to put the "original document" concept back in the statute.

Mr. Sokol stated that option B was probably closer to what was originally envisioned, and agreed that automatically triggered fines may not be a good idea if there are extenuating circumstances during the transition period.

Commissioner Scott asked whether signature authentication had been dealt with, and whether it was an issue with regard to the original.

Chairman Getman responded that the SOS and the FPPC were required to work on authentication under the law. She noted that there is a statewide task force studying the use of digital signatures and that work was underway in both agencies to find a solution to the digital signature question before the electronic filing becomes the only filing.

Alfie Charles, Press Officer from the SOS, noted that the SOS has adopted regulations that address the use of digital signatures in written communications with government entities. There are now two approved certification authorities that can certify the digital signatures used in government communications. They would be willing to work with the commission in applying it to electronic filings.

Commissioner Scott asked Mr. Charles if any issue has been made of the fact that California does not supply software. Mr. Charles responded that it is provided in most other

states and that there has been concern. It was requested in the original legislation, but the Legislature did not include free software from the Secretary of State's Office.

Mr. Sokol added that he believed that it was only a matter of time before California supplied the software.

Chairman Getman noted that providing for online filing was another option and that developing this option has been discussed with the SOS office. She pointed out, however, that the FPPC did not have the funding to develop it.

Commissioner Makel stated that, while she first thought that option B more closely mirrored the legislative intent, option A would be agreeable to avoid a legislative issue later.

Commissioner Deaver stated that option A is the better option.

Commissioner Scott stated that the authentication of signatures is a bigger issue than the issue of the original document.

Chairman Getman made a motion that, for purposes of imposing penalties for late filing, both the paper filing and electronic filing are to be considered an original under Government Code section 91013(a). Commissioner Makel seconded the motion. The motion passed unanimously.

Item 4. Application of the "Legally Required Participation" doctrine to Mayor Jerry Brown: The *Hicks* Opinion, No. O-99-314.

Commission Counsel Deborah Allison presented the City of Oakland's request for an opinion on whether the "Legally Required Participation" doctrine applies to allow Mayor Jerry Brown to perform various duties related to the Lower Broadway Redevelopment Project in the City of Oakland.

She explained that through Measure X, Oakland became a "strong mayor" form of government. Under this form of government, the mayor is not a voting member of the city council, but works in an executive capacity. The mayor's duties include the duty to actively promote economic development in the City of Oakland.

Mayor Brown, she explained, has a partial ownership interest in three contiguous parcels in the downtown area, part of it serving as his primary personal residence and one parcel providing commercial rental income to the mayor. The site of the Lower Broadway Project lies from 500 feet to 1500 feet from Mayor Brown's property interest, and his staff has advised the Commission that he has a conflict of interest in making or participating in decisions with regard

to that project. Ms. Allison summarized the list of the types of duties that the mayor would like to perform, which included negotiating with owners, drafting proposals, making recommendations to the city council, negotiating financial assistance, directing staff in zoning and land use alternatives, lobbying the city council, participating in closed session meetings, and helping legal staff develop legal strategies.

Ms. Allison noted that even though section 87100 of the PRA does not allow an official to make, participate in or influence a decision in which the official has a financial interest, section 87101 provides an exception to that rule if the government official's participation is legally required. Regulation 18708 provides that the public official is not legally required to participate in the decision unless there exists no alternative source of decision. She noted that this usually applies when a government body needs to make a quorum and too many members are conflicted out. With regard to a particular official's duties, the Commission has consistently found that the "legally required participation" doctrine did not apply because an alternative source existed. She pointed out that the Commission has never applied this exception to allow an official to participate in the broad range of duties that Mayor Brown is requesting.

Ms. Allison noted that the authority granted under the *Affordable Housing Alliance vs. Dianne Feinstein* case allowed Mayor Feinstein to veto a rent control issue even though she had a clear financial interest in the decision, because of the separation of powers doctrine.

Ms. Allison suggested that the Commission must first determine whether Mayor Brown would be influencing, making or participating in the decisions, by performing the duties described in the opinion request, noting that the distinction is important because the legally required participation doctrine does not allow an official to "influence" a decision.

Ms. Allison explained that the City of Oakland's position is that not allowing Mayor Brown to participate in the projects renders his branch of the government ineffective, and that the Lower Broadway Project cannot move forward without Mayor Brown's involvement. Staff believes that the *Feinstein* case does not bind the Commission to grant the exception.

Dan Rossi, Deputy City Attorney with the City of Oakland, explained that the principal in the *Feinstein* case should apply in this case, noting that both cases involve separation of powers and that Mayor Feinstein had a direct financial interest. Mr. Rossi explained that the Oakland charter gives the executive branch (the mayor) the authority to give policy direction to the administrative branch (the city manager) and to recommend legislation to the legislative branch (the city council). He noted that there is no alternative source of decision making with regard to economic development, and that if the mayor is not allowed to serve in that decision making role, the executive branch is taken completely out of decision making on economic development in Oakland, prohibiting the mayor from participating in redevelopment in about forty percent of downtown Oakland. He reminded the Commission that redevelopment was a major issue in the

election which brought Mayor Brown to office. He added that under the "home rule" provisions of the California Constitution, deference should be given to charter cities. He compared Mayor Brown's issues with Mayor Feinstein's issues, noting that Mayor Brown's interest was indirect, and that the ultimate decision would be made by the city council, and Mayor Brown's role would be to advise the city council and to make recommendations on legislation.

Oakland Mayor Jerry Brown stated that the *Feinstein* case absolutely requires that the exemption be given. He noted that this was not a question about financial bias, but about influencing and shaping a decision.

Mayor Brown noted that the property involved is a piece of commercial rental property and that the issues he would like to help decide are whether there should be shadows, or a certain amount of height to buildings, or congestion, and not of whether the projects increase the economic value of his property. He outlined the crisis the City of Oakland faces with a lack of building in the downtown area.

Mayor Brown explained that the voters passed Measure X to give the Mayor the role of leadership to promote economic development and to give direction to the city manager and the other members of the city council. He pointed out that efforts to oppose some types of development have been successful and that the mayor needed to be able to provide input into the process. Mayor Brown explained that opposition has been able to stop his economic development efforts because he has been absent from the process.

Mayor Brown stated that he has an indirect interest, and that he does not have the ultimate authority to make the decisions, but that the city council had the authority. The mayor directs the city manager to make sure that the jobs get done.

Mayor Brown argued that under the California Home Law provision the Commission must defer to the right of a city to govern itself.

Mayor Brown compared the *Feinstein* case with his position, noting that Mayor Feinstein was able to put money in her pocket by the vote, and a majority of the supervisors had no say in it. In his case, he argued, recommendations are made to the city council and the city council makes the decision. Feinstein had the power of veto, but in Oakland most decisions, he pointed out, are made by resolution of the city council and the mayor does not have the power to veto a resolution.

Chairman Getman questioned whether Mayor Brown was conceding that he had a conflict. Mayor Brown clarified that city employees said he had a conflict. Dan Rossi explained that at this point they could not say that it is not reasonably foreseeable that this project would not have a material financial effect on Mayor Brown's interest.

Mayor Brown noted that the "public generally" exception could apply someday, once more people live in the redevelopment area.

Wilda White, resident of Oakland and president of a neighborhood association, presented copies of maps of the City of Oakland which delineated the redevelopment area and noted where Mayor Brown's residence was located. She expressed her concern that past decisions may have been influenced or gave the appearance of having been influenced by Mayor Brown, and those decisions, she noted, affect the value of Mayor Brown's real estate and in some cases may impair the value of neighboring real estate.

Ms. White did not agree that the "legally required participation" exception would apply in this case because Mayor Brown's participation in the development is not legally required at all.

She explained that the city will be rewriting its zoning, determining density, height limits of buildings, parking requirements, and the number of dwelling units allowed on a piece of property, which will directly affect the value of Mayor Brown's land.

Ms. White explained that the area in question, known as the waterfront warehouse district, is an historic area eligible for listing on the national register. The people who have developed property in the area tend to favor height requirements, parking requirements, and historic preservation. Undeveloped property owners prefer to tear down buildings, have high population density, and build high rise buildings. These two differing opinions, she noted, have created tension in the area, and if the mayor is allowed to work "behind the scenes" it gives the mayor the appearance of impropriety. She added that the mayor's land is actually more valuable now than the improvements he has put on the property, and that if he is directly involved in increasing the allowed density, Mayor Brown would benefit personally.

Ms. White believes the mayor's duties are not unique, significant or legally required. She explained that before Oakland had a "strong mayor" charter, Mayor Brown called the duties of the mayor largely ceremonial. The duties of the mayor, she continued, remained the same after the passage of the initiative. Ms. White pointed out that the vice-mayor could perform those duties in the event that the mayor was unable to act. Ms. White noted that Measure X gave the mayor the power to direct the city manager. The city charter still holds, she explained, that the government of the city shall be known as the "council-manager" form of government, and that the city council is the main governing body of the City of Oakland. The power to recommend legislation is also given to the city manager, she explained. Additionally, the Oakland city charter prohibits a city officer from participating on behalf of the city in any transaction or activity in which he has a conflict of interest. The charter, she contended, does not make Mayor Brown's role unique, legally required, or indispensable.

Ms. White believes that the *Feinstein* "legally required participation" exception was based on duties that were unique, significant and there was no alternative source for the decision. She did not agree with Mayor Brown that the same situation existed in Oakland. She pointed out that in the *Feinstein* case the mayor designated who could take his or her place if the mayor is unable to act, and all legislation had to be presented to the mayor. In Oakland, she explained, the city charter designates who will take the mayor's place should the mayor be unable to act, and no legislation has to be presented to the mayor. In San Francisco, Ms. White noted, the mayor can approve, veto, or fail to sign legislation. In Oakland all legislation becomes law automatically

unless it does not achieve five votes. If that should happen, the mayor can suspend an ordinance but it can go back to the city council for a vote and the council makes that decision.

Ms. White also pointed out that the bylaws of the redevelopment agency do not legally require participation. She noted that the bylaws are not a statute, and, more importantly, the mayor holds a seat on the redevelopment agency only because the city council created that position for the mayor. Additionally, the redevelopment agency bylaws provide that the administrator of the redevelopment agency is required to act when the mayor is unable to.

The "legally required participation" doctrine, she argued, only applies to taking part in closed sessions or public deliberations, voting, and not the broad range of day-to-day behind-the-scenes activities Mayor Brown was contemplating in connection with moving the development projects forward.

Ms. White stated that public confidence in public institutions is seriously challenged if public officials are allowed to make government decisions when they have a financial interest.

Sanjiv Handa, with the East Bay News Service, stated that the mayor has participated in almost every closed session of the Oakland City Council and the Oakland Redevelopment Agency since he took office. This is significant, he stated, because many real estate decisions are made-behind-the scenes with only a cursory public vote taken. The mayor and his staff, he noted, have leaned very heavily behind closed doors on city council members and their aides, to vote a certain way in public settings. Mr. Handa assserted that Mayor Brown also has a conflict because of the location of his residence to the port of Oakland, and the port commission and staff have also been pressured through intermediaries. He questioned whether there is a financial conflict when the mayor appoints a partner in a private venture to a city board or commission, noting that Mayor Brown may likely appoint one of his real estate partners to the port commission. Lastly, Mr. Handa pointed out that the average citizen was not getting enough information regarding what was taking place.

Patrick Maloney, a lawyer from Alameda, expressed his concern about the statewide ramifications to this exception. If one exeption is given, it could cause problems on a lot of other issues and he stated that he believed it to be a bad exception.

Ms. Allison clarified that the court in the *Feinstein* case said that failure of Mayor Feinstein to sign would constitute approval so the legislation would move forward.

Commissioner Makel asked whether both sides agreed that the decisions that need to be made can be made with or without the mayor. Mayor Brown did not agree, noting that the whole point of passing Measure X was that the decisions were not getting made.

Commissioner Makel asked whether Mayor Brown would agree that his participation is required to fulfill his charter mandated duties. Mayor Brown responded yes, and explained that there is only one elected mayor, and that if the mayor cannot participate because of conflicts, the mayor is disabled from that piece of governance embodied by the charter. Both the mayor and

the city council give direction to the city manager, providing dual participation that will be destroyed if the conflict keeps the mayor from participating. That direction should not come from the vice-mayor who is in a totally different and low visibility position, but from an elected mayor who is highly visible and highly accountable and has a certain leverage that nobody else has. If the mayor is taken out of that process, he explained, the process becomes unbalanced and a new form of government is created, and that is the heart of the *Feinstein* case.

Commissioner Makel disagreed, stating that the *Feinstein* case was about a decision, and that the mayor's decision was a necessary part of the complete decision making process.

Mayor Brown pointed out that his input in the decision making process is envisioned in the city charter. He stated that if the Commission does not allow the exemption, they will invade, preempt and emasculate in a significant way, the charter of the City of Oakland. The question, he noted, was whether an FPPC regulation trumps the home rule envisioned in the California Constitution.

Ms. White stated that decisions could be made in the absence of the mayor by the vice-mayor.

Chairman Getman noted that the *Feinstein* case focused on the issue of the office and the office holder and that even though there was a provision for another person to temporarily take over the mayor's decision making duties, it does not say that there is another decision maker.

Ms. White argued that in the *Feinstein* case, the City of San Franciso did not have a vice-mayor, and the mayor had to appoint someone, making her a critical and significant part of the process. In Oakland, the city charter specifies that the vice-mayor steps in for the mayor.

Ms. Allison explained that the question of whether the mayor is legally required to participate under the city's charter depends on how the duties are read, and that the Commission would need to determine how broadly to interpret his duties under the charter.

Chairman Getman noted that the charter legally mandates that the mayor recommend legislation, and that an argument could be made that he is legally required to participate to the extent that he makes the recommendation and starts the process. If the process is started by somebody else, she asked, does the same requirement of participation apply? The Oakland city charter requires duties very different from the *Feinstein* case and any other case the Commission has heard.

Ms. Allison noted that, historically, the Commission has narrowly interpreted this statute and only applied it to making decisions and only to participating to the extent reflected in the regulation. The *Feinstein* case complicated the issue because the language discussed Mayor Feinstein's executive function, and the court said that the mayor did not have to delegate that function to an acting mayor, and interpreted that to mean that there was no alternative source for the decision but the mayor. The ultimate question, Ms. Allison stated, was whether the actions Mayor Brown was requesting that he be allowed to take are executive functions under the city charter.

Chairman Getman disagreed, noting that the question is whether those functions are legally required as part of a decision making process under the Oakland city charter.

Mayor Brown responded that the statute allows the mayor's participation because the city charter wants an action from the mayor. That action, he explained, is to recommend and promote economic development.

Commissioner Deaver pointed out that governmental decisions and action are tied together, and that the action is tied into a governmental decision.

Commissioner Makel questioned whether the mayor's participation is required to fulfill his city charter mandated duties. Commissioner Makel added that it is a separate question from the question the statute is asking, which is whether the decisions will be able to ultimately be made. She stated that it is a fine but important distinction.

Commissioner Scott pointed out that the mayor's role is to recommend and actively promote.

Mr. Rossi pointed out that the exception can cover public officials who are participating, not just those who are making the ultimate decision.

Commissioner Deaver stated that he supported economic development, but that many people can and do promote economic development, not just the mayor. He added that, even though the city charter may require his participation, the Act states that under certain circumstances a person cannot participate because they have a financial conflict. Commissioner Deaver noted that he did not believe the *Feinstein* case was relevant.

Mayor Brown explained that the decision is not just a vote, it is the entire process, and the city charter requires that the mayor be involved in a series of steps and should not be barred from participating in decisions related to a whole zone of the city.

Commissioner Deaver noted that the law also required that there not be a conflict of interest, and that the action could be taken without Mayor Brown's participation.

Commissioner Deaver asked whether economic development could occur in Oakland without the mayor's participation. Mayor Brown responded that it could, but that the issue was about the scheme of decision making envisioned by the city charter.

Chairman Getman noted that the question is whether Mayor Brown's participation is required at any point in the decision, but that she did not see that level of participation as a requirement of the mayor in the Oakland city charter.

Mayor Brown responded that the charter required that the mayor give direction to the city manager, and that he thought the city manager was required to give a written or oral presentation to the city council before they take an action.

Commissioner Deaver noted his concern that if the exception is granted, it would result in requests by many public officials for the exception.

Mayor Brown noted that there are no more than six "strong mayors" in California, and that there are ways to limit the exception.

Commissioner Deaver stated that cities may choose to become "strong mayor" cities should this exception be granted.

Mayor Brown responded that there is not currently a great movement for "strong mayor" cities. He added that the Commission should take seriously the Oakland city charter and the home rule provision and noted that there are built-in safeguards on all decisions involving contracts. Mayor Brown stated that when the Act was written, no one ever envisioned that it would include this kind of restriction.

Mayor Brown stated that it was the Commission's duty to harmonize competing interests, and that he believed that the Commission could effectuate a policy guaranteeing propriety and the appearance of propriety and yet let the sovereign people adopt a constitution they feel is right.

Commissioner Deaver stated that he thought Mayor Brown had a good argument with the "public generally" exception and asked Mayor Brown whether his property values will increase as a result of the decisions.

Mayor Brown responded that he did not care about any possible financial gain, his focus was on getting people to the redevelopment area. The real legal issue, he stated, is that there is a decision making process that is required by the city charter, and that it requires that the mayor give direction to the city manager. The problem with the "public generally" exception, he added, is that it requires ten thousand people and there are only a handful of people in the area.

Commissioner Swanson asked Mayor Brown how he would narrowly define his ability to participate without having a financial impact.

Mayor Brown responded that he did not believe that there was a way to do that. He noted that his financial interest is indirect, and that the decisions are for the public generally.

Chairman Getman noted that the city manager is required by the city charter to participate in discussions of meetings of the city council, and that she did not see that provision for the mayor. She pointed out that there needs to be the making of a government decision for the exception.

Mayor Brown suggested that the mayor's recommendation of a piece of legislation is a government decision.

Chairman Getman added that if the mayor was recommending legislation that he had

started, he may have an argument that the mayor's participation was legally required for that process which the mayor started by recommending the legislation.

Mayor Brown stated that it is very hard for city governments to make things move forward if there is not a person with authority to convene.

Commissioners Deaver and Scott left the meeting at 12:14 p.m.

Chairman Getman asked Mayor Brown to point out where Measure X would be hurt by a decision not to grant the exception. She located a section that required the mayor to give direction to the city manager, and a section requiring that the city manager participate in council meetings.

Mayor Brown noted that if the mayor cannot direct the manager, it eliminates a part of the decision making process and creates a different form of government.

Chairman Getman questioned whether the mayor or the city manager are legally required to participate in the decision to acquire county buildings under the city charter.

Mayor Brown responded that his intent in Measure X was to make the city manager the agent of the mayor.

Commissioner Deaver returned to the meeting at 12:17 p.m.

Commissioner Scott returned to the meeting at 12:22 p.m.

Chairman Getman stated that some of the things the mayor was asking to do fall under "directing," but that participating in closed session meetings or negotiations did not.

Mayor Brown stated that he did not go to those meetings anymore anyway, and that he did not have a vote in those matters, but that he did want to be able to direct the city manager.

Chairman Getman noted that the exception is allowed if the mayor's participation is legally required, but that under the charter, the mayor's participation was not legally required.

Commissioner Makel remarked that each of the duties the mayor was requesting an exception for needed to be studied further to see if they fit within the specific language of the charter.

Ms. White requested that the public be notified so that they can provide input. Commissioner Makel agreed.

Mr. Maloney cautioned the Commission to limit that discussion exclusively to Oakland.

Chairman Getman agreed, explaining that the Commission should look at the Oakland

city charter to determine what participation is legally required for a government decision to be made.

Mr. Maloney noted that the mayor could participate in the redevelopment issues if he chose not to live in the redevelopment area. Ms. White added that he could live in the redevelopment area if he rented.

Commissioner Scott noted that because the mayor is authorized to do things, it is not the final determination of "legally required."

Mayor Brown interpreted the *Feinstein* decision to mean that the result of keeping the mayor from exercising the veto would be inconsistent with the terms of the charter and the doctrine of separation of powers.

Chairman Getman suggested that the Commission come back after drafting an opinion which looks at each of the duties and determines, under the city charter, whether the city manager or the mayor is legally required to participate and if the mayor is allowed to direct the city manager under the charter.

Ms. Allison noted that the only other city charter that gives to the mayor the broad duties that the City of Oakland's charter grants is the City of Fresno.

Commissioner Deaver stated that the Oakland city charter was very specific about the duties of the city manager, but not specific about the duties of the mayor.

Assistant General Counsel Luisa Menchaca expressed her concern that the language the Commission was requesting refers to the duties and responsibilities of the mayor, and some of those would be easy for staff to analyze, but other sections would be more difficult. This would need to be taken at different stages, she added, and staff would have to provide the Commission with further guidance as to the language that refers to a general economic development that would ultimately lead to a specific governmental decision. She cautioned the Commission that those are duties and responsibilities, not decisions, and the two need to be kept separated.

Mayor Brown discussed Regulation 18708(a), noting that "no alternative source of decision" refers to a decision consistent with the purposes and terms of the statute authorizing the decision. He explained that it would mean a decision within a certain charter context and compared this case with the *Feinstein* case, noting that if the *Feinstein* decision had not been made, the operation of law would have functioned.

Commissioner Makel disagreed, explaining that the operation of law would not have functioned as it was envisioned that it ought to have, with the mayor having the ability to either veto or not veto legislation.

Mayor Brown responded that if the city manager operated without any direction from the mayor, it would be inconsistent with the purposes of Measure X.

Commissioner Makel agreed that there was some truth to Mayor Brown's position, but that the question was whether it involved a decision. She stated that Mayor Brown's argument that the mayor cannot carry out his charter mandated duties was very persuasive, but that the statute only discusses legally required participation when a decision is to be made.

Chairman Getman explained that the question revolved around where the decision lies, and gave specific examples. She noted that the Oakland city charter required input from the city manager, but did not require input from the mayor.

Commissioner Scott added that the city manager serves in an important executive capacity, and that the city manager is an administrator and not a political appointee.

Mayor Brown asked for the definition of "action" and Chairman Getman responded that it was the making of a governmental decision and that in the City of Oakland, the city council makes the decision.

Ms. Allison noted that if there is no government decision, there is no conflict to begin with.

Commissioner Deaver motioned that the Commission deny the exception requested by the City of Oakland. Commissioner Scott seconded the motion.

Commissioner Deaver stated that he did not believe that the duties Mayor Brown wanted to perform under the exception qualified as legally required participation under the statute.

Chairman Getman noted that giving direction to the city manager does fit the statute, but negotiations and participation in closed sessions did not fit the statute.

Commissioner Scott noted that under Regulations 18701 and 18702 participating in a governmental decision does include negotiation.

Commissioner Deaver added that anything the mayor does must be done in public, and that most of the duties Mayor Brown was discussing were not done at a public meeting.

Chairman Getman proposed an amendment to the motion to deny the exception in part and grant it in part to the extent that under the charter the mayor is required to give direction to the city manager and he is required to participate in city council decisions.

Commissioner Deaver responded that the amendment would create a legal morass and did not accept the proposed amendment.

Commissioner Swanson proposed an amendment which would allow the mayor to direct

city staff, including the city manager and the public works agency, to pursue public improvement projects (e.g., street improvements, landscaping, park development, and public parking facilities) to facilitate development of the redevelopment project, allowing the mayor to have the relationship with the city manager that he was requesting, and not take him completely out of the process.

Commissioner Deaver stated that he might be amenable to that amendment. He added that the activities must take place in a public meeting and therefore the amendment may not work.

Commissioner Scott stated that she would vote against the amendment, and noted that if something is determined to be legally required, it must meet Regulation 18708(b).

Ms. Menchaca remarked that the issue is whether the mayor can direct the city manager in any of his duties with respect to this project, and that it would not be consistent to include some of the duties and not others.

Chairman Getman suggested a motion allowing the mayor to direct the city manager insofar as he or she participates in decisions related to the Lower Broadway Project but that the mayor himself may not participate in those decisions.

Commissioner Scott stated that she saw that as a distinction without a difference and it does not meet the goal of requiring the discussions be done in public.

Commissioner Deaver noted that if an exception is granted it would establish a precedent.

Commissioner Swanson retracted her proposed amendment to the motion.

Commissioner Deaver called for the question on his motion that the Commission does not agree that the rule of "legally required participation" allows Mayor Brown to participate in or influence city or agency decisions related to Oakland's Lower Broadway Project.
Commissioner Scott seconded the motion.

Commissioners Scott, Makel, Swanson and Deaver voted "aye." Chairman Getman voted "nay." The motion carried 4-1.

Chairman Getman directed staff to prepare a written opinion and present it at the March meeting.

Mayor Brown questioned whether, through this decision, the Commission opined on the underlying issues of whether this involved a material conflict or not.

Chairman Getman responded that the Commission had not opined on the conflict issues,

and had simply rejected the request for the exception. She clarified that the Commission had made the decision that the rule of "legally required participation" does not allow Mayor Brown to participate in decisions relating to the Lower Broadway Project, and that opinion will be presented in written form at the March meeting.

Mayor Brown stated that he would like to have the option to withdraw the request, because the vagueness that existed before the decision was made was now compounded. He noted that he would like a little time to think about the implications of the opinion, possibly to consider litigation.

Chairman Getman pointed out that if Mayor Brown withdraws the request, he still cannot participate.

Commissioner Scott suggested that he wait for the written opinion, after which he can still pursue litigation.

Mayor Brown noted that when the request was made, it was constructed very broadly, and now that very broad request has become a disablement which he had not anticipated.

Chairman Getman explained that the Commission would present the written draft opinion at the next meeting and that Mayor Brown was allowed to come and provide his input.

Mayor Brown noted that he would like to offer his response once the opinion is written, based on what the decision is, regarding "action" and "decision" and the nature of the *Feinstein* case.

The meeting adjourned for closed session at 1:00 p.m.

The public meeting reconvened at 2:20 p.m. In addition to Chairman Getman, Commissioners William Deaver, Kathleen Makel and Gordana Swanson were present.

Item #5. Status of Phase 2 Project Examining Principal Residences of Public Officials Located in or near Redevelopment Areas. (Project 'B').

Legal Counsel John Vergelli presented this project, noting that it was brought about on the basis of a suggestion by Oakland Mayor Jerry Brown. Mayor Brown requested that the phase 2 project include looking at whether or not the Commission should mitigate the conflict situation for public officials who own personal residences in redevelopment areas. This question, he explained, raises two sets of issues. The first is the broad question of whether the Commission wants to look at particular types of government decisions, such as redevelopment decisions, and particular types of economic interests, like personal residences, to determine whether different treatment is warranted. The second set of issues involves the actual language of the mayor's proposal. Mr. Vergelli referred the Commission to the memorandum he had written dealing with

both sets of issues.

Dan Rossi, Deputy City Attorney with the City of Oakland, explained that redevelopment areas should be singled out because state law has already defined the area as needing special attention. He stated that there should not be a disincentive in the law for public officials to live in the poorer areas of town, nor should there be a disincentive for someone who lives in a poorer part of town to run for office. Mr. Rossi noted that public policy should be to encourage public officials to live in the areas that they govern.

Mr. Rossi added that redevelopment law does make a distinction between personal residences and other properties. He explained that redevelopment officials cannot acquire property in a redevelopment project area, but there are exceptions for personal residences, recognizing that redevelopment officials should not be prevented from living in and getting to know the conditions of the redevelopment area.

Wilda White, resident of the City of Oakland, opposed the exception. She explained that just because a piece of property belongs to a redevelopment official it should not be considered immaterial, and in fact, it could be quite material. She pointed out that the whole purpose of the conflict law is to ensure that government decisions are not affected by financial interest and that this proposal is not consistent with that basic concept.

Ms. White noted that there are no safeguards in the proposal to ensure that decisions are not made if a financial conflict exists. She explained that in Mayor Brown's situation, if he had a traditional family home, the issue would not be as much of a problem. In his case, she continued, his residence building has a radio station, meeting hall, guest rooms, five residential dwellings which have a meeting area, offices, and is the headquarters of a political organization. Because of the construction that Mayor Brown chose, the building is now worth less than the land on which it is built.

Ms. White did not agree that having public officials live in the redevelopment area is more important than having fair and impartial government decision making. She added that in her "blighted" redevelopment neighborhood, condominiums were selling for $400,000.00. Ms. White noted that if the public official rented in the redevelopment area instead of owning a residence, that public official could then participate in the decision making process.

Chairman Getman explained that in the City of Fresno, a person is required to live in the city in order to be on the redevelopment agency, and most of the city is in a redevelopment area and asked whether there was a sense among staff as to whether this issue was a real problem in many areas.

Mr. Vergelli responded that staff fairly regularly advises about situations involving facts similar to the Fresno situation. Additionally, he noted, since this issue has been under scrutiny by the Commission, the only substantive comments received by staff have been from Oakland

Mayor Jerry Brown, some late comments from Fresno, and some support for the notion from the realtors and also from some city attorneys. He would not characterize the public interest as a groundswell in favor of the proposed exemption. He theorized that one reason for the low amount of public interest could be that the facts of Mayor Brown's situation are so unusual.

Ms. Menchaca noted that this could be part of the general discussion as to residence generally, not just residence in a redevelopment area. She added that staff recommended that the Commission not entertain this proposal partially for that reason, and because Oakland's proposal is couched as a finding that there is "no material" financial effect. Ms. Menchaca suggested that it might be more appropriate to look at this issue in the "public generally" context.

Commissioner Deaver noted that he had never seen this issue come up before.

Liane Randolph, representing the FPPC Committee of the League of California Cities, Attorney's Division, stated that she agreed with Mr. Vergelli's position that Mayor Brown's situation is unique. While the Committee is generally in favor of the regulation, they do not consider it a pressing issue.

Commissioner Deaver pointed out that redevelopment has a checkered past in California, and he was reluctant to allow exceptions for one or two people.

Ms. Randolph noted that the California redevelopment law regulates this area to some extent, and any sort of exception that applies to redevelopment issues is balanced out by the fact that the Community redevelopment law tries to address the same issue, and recognizes a personal residence, and that having officials live in the redevelopment area is a positive thing.

Chairman Getman suggested that if it is not a big problem, that they do not proceed with this proposal, but discuss it under the "public generally" exception. She agreed that there are important policies that need to be studied in that discussion.

Commissioner Makel agreed, questioning the rationale that the Commission encourage public officials to live in the "blighted" areas, noting that the definition of "blighted" can be very creative.

Commissioner Deaver stated that there may be something the Commission could look at later regarding private residences.

Sanjiv Handa, of the East Bay News Service, pointed out that there are cases when elected officials advocate making their jurisdiction a redevelopment area, and that some officials temporarily "move" their residences during election time.

Mr. Rossi pointed out that this issue does not affect a lot of officials in Oakland because

many of those officials are wealthy and do not choose to live in the redevelopment area, and questioned a law that might prevent a public official from choosing to live in another area. Mr. Rossi stated that much of the warehouse district in Oakland is not traditional housing. He explained that Mayor Brown's residence encompasses about 18,000 square feet of the building, and the commercial space is about 5,000 square feet.

Chairman Getman motioned that no further action be taken on the proposal before them, but that the Commission bear in mind the issue of personal residences during the "public generally" exception discussions.

Commissioner Makel seconded the motion.

There being no objection, the motion carried.

Item #6. Status of Phase 2 Project Examining Reasonable Foreseeability of Material Financial Effects on Economic Interests of Real Estate Brokers and Agents. (Project 'C').

Legal Counsel John Vergelli introduced this Phase 2 project, noting that this proposal was suggested by a member of the regulated community.

This proposal, he explained, would place a limit on the window in which the Commission could decide whether a given government decision had a reasonably foreseeable material financial effect on particular economic interests of real estate agents and brokers. Mr. Vergelli noted that the FPPC Committee of the League of Cities is not pushing the proposal as rigorously as they were originally. He suggested that, under that circumstances, the Commission may wish to consider moving away from this regulation.

Chairman Getman stated that she did not want to develop industry specific regulations, but liked the idea of further discussions of setting a time limit as to when the reasonably foreseeable financial effect must take place in order to be considered a conflict.

Mr. Vergelli responded that the existing "time limit" is not open ended because the more time that has passes, the more speculative the potential financial gain becomes.

Chairman Getman noted the importance of bright line rules, and pointed out that at a certain point "reasonably foreseeable" cannot be determined because so much can change after a period of time.

Commissioner Deaver agreed.

Ms. Menchaca explained that under the conflict of interest rules a determination must be made as to whether the material financial effect exists at the time the governmental decision is made. She noted that the twelve month window is too short, but that with guidance staff could look at the parameters of this issue.

Mr. Vergelli clarified that in the case of the *Teasley* Advice Letter, the impact accumulated over a period of fifteen years.

Commissioner Deaver suggested that staff do further research, with input from appraisers, assessors and the real estate industry, to get an idea of what would be reasonable.

Chairman Getman noted that the decisions could be a series of decisions on a series of plans, some being immediate and some being further in the future. A definitive time cut-off might help in those situations, allowing a public official to vote on pieces of a proposal that were further in the future.

Commissioner Swanson stated that she believed very strongly in public participation, and that a law which keeps people looking fifteen years ahead will discourage public participation. She noted that fifteen years was too far in the future to be considered a conflict.

Mr. Vergelli explained that the *Teasley* Advice Letter involved a proposal that involved a fairly extreme set of facts that happened to involve a fifteen year time frame. He added that the time frame does not have to be fifteen years in conflict situations.

Commissioner Makel expressed her concern that if a time frame is adopted, a situation could arise where a definitely foreseeable financial effect would occur after the time frame ended, and wanted to make sure that a public official in that situation would still be determined to have a conflict.

Chairman Getman questioned whether it could be determined to a certainty that far in the future. She pointed out that many things can affect potential financial effects.

Ms. Menchaca responded that the issue could be addressed in the regulation.

Enforcement Chief Cy Rickards reported that, historically, enforcement cases are rarely taken involving property beyond three hundred feet.

Ms. Randolph explained that the League of Cities began to shift the focus away from the specific proposed language because they saw a greater opportunity to do something involving a standard of care that would help address problems that occur with all public officials, not just real estate professionals. She compared it with the personal residence in a redevelopment area issue, and supported the idea of providing a standard of care that would give officials guidance so that they could look at really speculative issues. One possibility, she agreed, would be a presumption after or before a certain point. The issue of timing comes up not just in real property decisions, but also in any other kind of decision when the financial effect must be determined. She agreed that looking at times frames would be a good idea.

Chairman Getman directed that staff should come back to the Commission with another proposal addressing the time frame issue.

Commissioners Deaver, Makel, and Chairman Getman stated that they did not want to pursue industry specific rules.

Mr. Vergelli introduced the "standard of care" notion, explaining that it was developed to help public officials analyze the "reasonably foreseeable financial effect" required by Section 87103. He noted that issues raised during the public workshops and interested persons meetings, are presented in the memo to the commissioners.

Ms. Randolph stated that the most useful thing that could happen at this point would be to give the League of Cities and FPPC staff the opportunity to explore the idea, and to give them direction to indicate whether or not the Commission is interested in the idea of a standard of care.

Stan Wieg, with the California Association of Realtors, stated that they support Ms. Randolph's notion. He stated that there is not yet enough consensus because there has not been a draft for them to work on. Mr. Wieg noted that the issues of remoteness geographically, remoteness in time, and predictability need to be studied. He stated that there did not need to be a special rule for realtors, and that the standard ought to be the same for everyone, adding that the "public generally" rule will deal with issues not covered by the "standard of care."

Mr. Wieg added that the "public generally" rule also needed to be worked on and offered his help working with staff to develop a draft. He noted that the California Association of Realtors has sponsored legislation that will touch the "public generally" section for a local public official.

Mr. Rickards clarified that there is a reasonable person standard, and that it contains some sub-issues that need more discussion. He added that a public official may receive poor advice from counsel, but questioned whether the Commission should be granting immunity based on poor information from counsel because it takes the Commission completely out of the process. Mr. Rickards noted that it is important in the discussions to factor in the public perception.

Chairman Getman noted that public officials need to know that it is safe for them to vote.

Mr. Rickards discussed the difficulties with using property assessments, especially factoring in the variables associated with property values.

Chairman Getman asked if there was a consensus among the commissioners to direct staff to continue to meet with the public and the community to further explore the standard of care issue. The commissioners agreed.

Item #7. Pre-notice Discussion of Proposed Amendments. Amend Regulation 18704.2 -

Interest In Real Property. Amend Regulation 18705.2 - Economic Interests in Real Property. (Project 'D').

Mr. Vergelli presented this Phase 2 project, which looked at rules for determining how much of a financial effect is important enough to trigger a conflict.

René Chouteau, City Attorney from Santa Rosa, presented his proposal to create a "bright line" rule that would allow the layman to make a decision without hiring an appraiser. He noted that when the distance from a public official's property is between 300 feet and 2,500 feet from an area involved in a government decision, it is difficult to determine whether the decision will have an effect of more than $10, 000.00 on the value of the property. In those cases, the city attorney often advises that the public official must get an appraisal or not vote on the issue.

Mr. Chouteau presented computerized maps delineating the area where the economic interest would be affected for a particular neighborhood in Santa Rosa. He noted that the area within 300 feet of the property in question was the immediate neighborhood. He stated that properties outside that 300 foot area were unlikely to create any economic effect, and explained the difficulty for appraisers to determine whether there is an economic effect. Mr. Chouteau explained that, for planning purposes, cities are constitutionally required to give notice to people who are going to be economically affected by planning decisions if their property is within 300 feet of property involved in a planning decision, and noted that properties outside that 300 foot area do not receive notice because there should be no economic effect. Because of that city planning rule, he added, the 300 foot rule made sense as a bright line.

Mr. Chouteau noted that the goal was to identify the conflicts that may occur and set a rule that would prevent those conflicts from happening. He argued that a bright line rule would define most of the conflicts and that it would not be worthwhile to try to further define conflicts if it means that some public officials will not be able to vote because they do not have the time or the money to get an appraisal of their property. He encouraged the Commission to rule that within 300 feet there is a conflict, and outside of 300 feet there is not a conflict, unless special circumstances apply.

Mr. Chouteau noted that the option presented by staff retaining the current distance definitions, but changing the economic effect from $10,000 to $30,000 would still require an appraiser and would not solve the problem.

Ms. Randolph stated that the FPPC League of Cities supported Mr. Chouteau's proposal to establish a bright line.

Chairman Getman agreed that there needed to be a more workable solution for properties in the 300 foot to 2,500 foot distance area, but expressed her concern that deleting the conflict rules would allow public officials to vote when there was a conflict in some circumstances.

Mr. Chouteau responded that improved services would involve a conflict, but did not agree that an economic effect would take place in most other circumstances when the property is

more than 300 feet away.

Commissioner Deaver noted that the "public generally" exception might apply in those cases outside the 300 foot area.

Mr. Chouteau agreed, but pointed out that applying that rule can be difficult in a short period of time. He also noted that utilizing the 300 foot rule only would make enforcement much easier.

Ms. Menchaca stated that the 300 foot rule was established because it was presumed that there would be a financial effect, but that it has not been factually shown to occur in every case, and suggested that the commission could consider changing the 300 foot rule to 1,000 feet, thereby retaining the "bright line."

Mr. Rickards stated that establishing a "bright line" rule, at whatever distance the commission finds reasonable, would be easier to apply because the issue of actual financial effect would not have to be addressed.

Commissioner Makel agreed, and noted that the public and electorate, the news media and other forces in the electorate process also serve as a check on conflicts, and that a regulatory scheme that does not work should not be continued.

Commissioner Deaver agreed, noting that there was no objection to eliminating the 300 foot to 2,500 foot rule.

Mr. Vergelli noted that, while there has been no public outcry, there are very few members of the public who ever provide public input to these issues, and suggested that it should not be assumed that the public would not object to the change.

Commissioner Deaver responded that at city council and school board meetings the public is vocal, and that the public does pay attention to these issues.

Commissioner Swanson asked whether there was a uniform rule on notification for public hearings on land use in cities. Ms. Randolph responded that there was a state law requiring notification if the property is within 300 feet, and that some local jurisdictions have standards requiring further distances, and that there is a 10 day publication notice as well as an agenda posting rule. Commissioner Swanson stated that she would be in favor of eliminating the 300 foot to 2,500 foot provision, but that she was not sure that the 300 foot provision was a large enough distance and suggested that 1,000 feet may be more appropriate.

Chairman Getman noted that there seemed to be a consensus among the commissioners that the current method does not work. She proposed that staff prepare two options, one changing the current three tier system to a two tier system, the second option retaining the three tiers, but devising a middle tier test that can be quickly applied and would not require a public official to determine the potential property value financial effect. She stated that the "unique effect" standard was important to retain, but suggested that the "public generally" exception may already have that standard.

Mr. Vergelli explained that the regulation was adopted before taking the current approach with the "public generally" exception, and that staff had considered changing the regulation to conform more to the current "public generally" exception, but had decided not to make the change at this time because so many other changes were being considered.

Ms. Menchaca suggested that if the commission was going to consider a two tiered rule, the "public generally" portion of the regulation may need to be placed somewhere else.

Mr. Vergelli cautioned that there needs to be something in the regulation that will route people to the "public generally" exception when they reach that outside tier.

Chairman Getman noted that the "special circumstances" language should accomplish that.

Ms. Menchaca stated that the "special circumstances" rule would require that staff receive all the facts, but that they would just work harder at getting those facts.

Mr. Vergelli discussed the "one penny" rule dilemma, explaining that there were actually three "one penny" rules. Two options recommended by staff, he explained, present methods to mitigate the confusion presented by the three rules.

Mr. Vergelli stated that two provisions currently styled as materiality standards would be more appropriately styled as issues of property being directly or indirectly involved in a decision. The provisions involved property within the 300 foot boundary, and property which would receive improved services as a result of the decision. He suggested that the two provisions be changed from materiality standards to tests for deciding when property is directly involved. If the commission decides to go with a two tier system, he noted, this will serve to clarify what is in the first tier.

There was no objection from the commission.

Mr. Vergelli suggested a clarification of the regulation which would use the word "presumption" in the statute.

Chairman Getman stated that the language was good.

Mr. Vergelli explained that if this was done, there would be consequences with other regulations and that those regulations would be brought to the commission for review later.

Mr. Vergelli discussed what the public official would need to do to show that no conflict existed. He explained that the current "one penny" rule required that the public official be able to show that there would be no financial effect from a governmental decision, pointing out that the public has perceived that as unrealistic and that it may be contrary to the statute. The argument, he stated, is that the drafters of the statute used the word "material" because if it is not

a material effect, or only a small effect, there is no conflict. If the "presumption" language is adopted, and a public official has property within the first tier, the official would have to show that the decision would have no more than a *de minimis* effect on their property.

Mr. Vergelli explained that a *de minimis* standard could replace the "one penny" standard noting that would arguably be truer to the intent of the statute, and would preserve the intent of having a very close zone which, if a public office resides there, would almost always create a conflict.

Mr. Rickards noted that the public perception is an important issue which needs to be considered and introduced Senior Commission Counsel Deanne Canar to present Enforcement Divisions views on the proposal.

Ms. Canar pointed out that creating a *de minimis* standard would be contrary to what the commission was trying to accomplish in the simplification of the regulations, because it would exchange a bright line "any financial effect" rule (also referred to as the "one penny" rule) for a dollar figure, and would require an appraisal of the property by the public official and Enforcement Division. Ms. Canar added that the advantage of the "one penny" rule over the *de minimis* rule is that it is clear, easier for the public to understand and easier to enforce. She noted that allowing a public official to vote on matters in which his property is directly involved has a tendency to cause the public to lose respect for this agency and the political system as a whole, because the general public perception is that a public official should not be allowed to vote on matters that directly affect his own property.

Ms. Canar stated that it would be better to have the "one penny" rule with a presumption in place that requires the official to justify his participation to the public by proving that the decision will have no financial effect on his property. A *de minimis* test would reopen and extend problems to property directly involved in a decision.

Mr. Rickards stated that once a dollar amount is set, it causes difficulty for both the public and the Enforcement Division, and noted that the potential gain may not be worth it.

Ms. Randolph stated that the FPPC League of California Cities supports the notion of a *de minimis* standard because it is not the same as the rule for the 300 foot to 2,500 foot distance in that it would involve the 300 foot rule with a presumption and a *de minimis* standard. She added that the official would have to make the decision of whether to pursue it and they would have the burden of proof. She believed a *de minimis* standard would be truer to the statute.

Chairman Getman noted that it could give the commission some credibility because it could show that the effect is *de minimis*.

Mr. Rickards responded that dollar amounts create problems, but that if the commission determined that it was worth it to live with those problems in order to have greater credibility, enforcement staff could live with the problems.

Robert Leidigh, attorney, stated that a *de minimis* standard was not necessary if the commission chose to retain the 300 foot tier. If the commission chose to move that boundary

farther out, and change to a two tier process with a rebuttable presumption, a *de minimis* standard should be considered because it will include a much larger area.

Mr. Chouteau stated that the *de minimis* rule does make sense in the area of utilities, encouraging preserving the word "substantially" to allow some kind of *de minimis* consideration. He noted that there was a *de facto de minimis* rule because some decisions don't affect the value of the property.

Chairman Getman agreed that there needed to be a rule of reason.

Ms. Menchaca noted that if public officials knew that factors, including a change in the use of the relationship of the real property, the character of the neighborhood, or whether it affected development potential or income producing potential, had to be considered in making a conflict determination, a *de minimis* rule might not be necessary.

Chairman Getman suggested that the issue of "substantially improved services" is similar to the *de minimis* issue in that one side wanted bright line rules and the other side wanted some flexibility.

Ms. Randolph noted that the "substantially improved services" is different because public officials should not vote on substantially new services, but if it is routine maintenance or upgrading of the same level of service, it should fit in the exception. She believed that "substantially" should be kept in the wording.

Chairman Getman noted that the "leasehold" and "substantially" issues need to be discussed further at the next commission meeting. She directed staff to look into the possibility of a *de minimis* standard that may or may not have a dollar figure, if the 300 foot line is moved, depending on where it is.

Items #8, #9, and #10.

Commission Counsel Amy Bisson Holloway explained that the maximum fine was imposed against the California Republican Assembly Committee Against Tax Increases because of the difficulty staff encountered. Five statements were not filed prior to the election because the committee was unwilling to respond and participate fully in the investigation.

There being no objection, Chairman Getman ordered the approval of the following items on the consent agenda.

Item #8.	**In the Matter of Edward E. Penhoet, FPPC No. 98/689.**
Item #9.	**In the Matter of California Republican Assembly Committee Against Tax Increases and James Harnesberger, FPPC 96/305.**
Item #10.	**In the Matter of California Healthcare Committee on Issues, Sponsored By California Healthcare Association, and Doug Hitchcock, FPPC No. 99/085.**

Items #11, #12, and #13.

Chairman Getman stated that the commission would take under consideration the following reports:

11. Litigation Report.
12. Executive Director's Report.
13. Legislative Report.

The meeting adjourned at 4:30 p.m.

Dated: February 22, 2000

Respectfully submitted,

_____
Sandra A. Johnson
Executive Secretary

Approved by:

_____
Chairman Getman